In the United States Bankruptcy Court
for the
Southern District of Georgia
Brunswick Division

In the matter of:	)	
	)	Adversary Proceeding
LILLIAN F. KIRTON	)	
WILLIAM CHARLES CARROLL	)	Number 00-2065
(Chapter 13 Case 99-20813)	)	
	)	
Debtors	)	
	)	
	)	
	)	
LILLIAN F. KIRTON	)	
WILLIAM CHARLES CARROLL	)	
	)	
Plaintiffs	)	
	)	
v.	)	
	)	
FORT STEWART FEDERAL CREDIT UNION	)	
	)	
Defendant	)	

MEMORANDUM AND ORDER
ON DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

The Debtors in this Adversary Proceeding, Lillian Kirton and William Carroll, filed the underlying Chapter 13 case on July 12, 1999, and filed this Adversary complaint on November 15, 2000.[1] The Debtors are seeking turnover of overpayments in

[1] Ms. Kirton, along with her husband James F. Kirton, filed Ch. 13 case #90-2-793 on 12/12/90, which was dismissed on 11/16/92. The Kirtons again filed Ch. 13 case #92-20876 on 12/14/92, which was converted to a Chapter 7 case on 3/9/94. Ms. Kirton, along with William Carroll, filed Ch. 13 case #97-20731 on 6/16/97, which was dismissed on 7/7/99. The current Ch. 13 case was filed on July 12, 1999.

the amount of $12,594.00 made to Defendant, Fort Stewart Credit Union, since November 11, 1994; remittance of $27,387.43 paid by CUNA Mutual Group to Fort Stewart Credit Union under a life insurance policy held by Mr. James Kirton and Mrs. Lillian Kirton; and compensatory and punitive damages for Defendant's alleged willful misrepresentation in the amount of $300,000.00. In response to the pleadings, Fort Stewart Credit Union filed a motion for Summary Judgment. This is a core proceeding pursuant to 28 U.S.C. § 157 (b)(2)(E). Based upon the applicable authorities and evidence presented, I make the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

This case has a long and complicated history before this Court, which necessitates recitation of the factual circumstances behind it. In 1984, Lillian Kirton, along with her husband James Kirton, purchased a mobile home which they financed with a purchase money loan secured through the Fort Stewart Federal Credit Union. Complaint, ¶ 6, 7. At the time that the Kirtons purchased the mobile home, they also purchased joint credit life insurance. On November 30, 1992, Fort Stewart Federal Credit Union refinanced the loan on the Kirton's mobile home, and a new life insurance application, signed only by Mrs. Kirton, was filled out. *See*, Movant's Brief In Support of Motion for Summary Judgment, Exhibit A, p. 3. On the face of this Loanliner policy, Lillian Kirton elected single credit life coverage. Id.

The terms of the policy provide that members are eligible for insurance if

they are under the age of 71 on the loan date. The policy also states that "[t]he member must also be under 71 on the maturity date of the loan. If a member will be over this age, insurance will be provided up to age 71." Defendant's Exhibit B, p. 3. The policy further provides that "[i]f a member stated in his Application that he is older than the maximum age for Insurance, he will be insured for the period the premium will purchase regardless of his actual age." Id.

The Credit Union, through an error, continued to charge the Kirtons for the joint credit life insurance premium established under the 1984 loan. Mr. Kirton died on November 11, 1994 at the age of 73. Upon Mr. Kirton's death, Mrs. Kirton took copies of the death certificate to Don Winkles, Executive Vice President of the Fort Stewart Federal Credit Union.[2] Mr. Winkles did not file a claim on the CUNA policy on behalf of Fort Stewart Federal Credit Union, believing Mr. Kirton to be above the maximum age covered by the policy at the time of his death. (Winkles, Depo. p. 14).

On June 3, 1995, Mrs. Kirton married William Carroll, co-debtor in this case. In July or August of 1999, Mr. Carroll contacted Fort Stewart Credit Union and CUNA regarding the policy. They received $27,384.43 from CUNA, which represents the

[2] There is a dispute among the parties as to whether or not the death certificate was received by the Credit Union. Mr. Winkles, in his deposition, states that he did not receive a death certificate and learned of Mr. Kirton's death through the local newspaper. (Winkles, Depo. p. 18). Mrs. Kirton states in her deposition that she took the death certificate over to Mr. Winkles' office, personally. (Kirton, Depo. p. 10). For the sake of this summary judgment motion, this Court adopts Mrs. Kirton's statement that the death certificate was presented to Fort Stewart Federal Credit Union.

amount due for payoff on November 11, 1994, which was deposited into Mrs. Kirton's Credit Union account on September 24, 1999. $4,014.47 of this amount was sent to the Chapter 13 Trustee.

CONCLUSIONS OF LAW

Federal Rule of Civil Procedure 56(c), applicable to this Bankruptcy Court under Federal Rule of Bankruptcy Procedure 7056, states that this Court can grant summary judgment only if "there is no general issue as to any material fact and . . . the moving party is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c). A fact is material if it might affect the outcome of a proceeding under the governing substantive law. *See* Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202 (1986). The moving party has the burden of establishing its right to summary judgment, and the court will read the opposing party's pleadings liberally. *See* Clark v. Coats & Clark, Inc., 929 F.2d 604, 608 (11th Cir. 1991); Clark v. Union Mut. Life Ins. Co., 692 F.2d 1370, 1372 (11th Cir. 1982); Anderson, 477 U.S. at 249, 106 S.Ct. at 2510-11.

To determine if there is a genuine issue of material fact, the Court must view the evidence in the light most favorable to the party opposing the motion. *See* Adickes v. S.H. Kress & Co., 398 U.S. 144, 90 S.Ct. 1598, 1608, 26 L.Ed.2d 142 (1970); Rosen v. Biscayne Yacht and Country Club, Inc., 766 F.2d 482, 484 (11th Cir. 1985). After a *prima facie* showing that the moving party is entitled to judgment as a matter of law, the party opposing the motion must go beyond the pleadings and demonstrate that there is a

material issue of fact which precludes summary judgment. *See* Martin v. Commercial Union Ins. Co., 935 F.2d 235, 238 (11th Cir. 1991).

The Movant argues that the adversary action is barred by the statute of limitations for tort actions, which requires that an action be filed four years after the earliest cause of action, which in this case is the death of James Kirton on November 11, 1994, and the subsequent failure of Fort Stewart Federal Credit Union to file a claim pursuant to the life insurance policy. O.C.G.A. §9-3-31 states that "injuries to personalty shall be brought within four years after the right of action accrues." *See* Worrill v. Pitney-Bowes, Inc., 128 Ga. App. 741, 197 S.E.2d 848 (Ct. App. Ga. 1973)(holding that the statute of limitations is four years in actions alleging misrepresentations based on deceit and fraud involving personalty and that the running of the statute is computed from the date when the plaintiff could first have maintained his action to a successful result). O.C.G.A. §9-3-32 states that "actions for the recovery of personal property, or for damages for the conversion or destruction of the same, shall be brought within four years after the right of action accrues."

The Respondent argues that the applicable statute of limitations should be 6 years, as found in §9-3-24, which states that "all actions upon. . . . simple contracts shall be brought within six years after the same became due and payable." A contract of insurance is a simple contract in writing. *See* Turpentine & Rosin Factors, Inc., v. Travelers Ins. Co., 45 F. Supp. 310 (S.D. Ga. 1942)(stating that all actions on simple contracts in writing to be brought within six years after the claim becomes due and payable); Smith v.

State Farm Mutual Automobile Insurance Company, 152 Ga. App. 825 (Ct. App. Ga. 1979) (holding that where the defendant insurer was the real party defendant against whom substantial, indeed, the sole relief was prayed and the sole basis of the claim was in contract, on the insurance policy . . . the original claim should be construed as a contract claim against the real party defendant insurer).

The pleadings in this case call for turnover of funds based on the Credit Union's "negligence" in failing to make a claim on the life insurance policy in November of 1994, the time of Mr. Kirton's death. They further seek compensatory and punitive damages based on "willful misrepresentation" by the Credit Union. The Respondent focuses on the Credit Union's negligence as creditor to pursue the life insurance claim. Thus, the issues presented for adjudication in this Motion for Summary Judgment sound in tort, rather than in contract, and as such the statute of limitations in this matter is four, rather than six years.[3]

In tort actions, the test to determine when the statute begins running is "whether the act causing the damage is in and of itself an invasion of some right of the plaintiff, and thus constitutes a legal injury and gives rise to a cause of action. If the act is

[3] It is important to clarify at this point that this adversary does not assert the issue of whether Mr. Kirton was, in fact, covered by the life insurance policy at the time of his death as against CUNA, which would be a claim sounding in contract. Rather, this adversary focuses solely on Fort Stewart's liability for the delayed turnover of funds paid by CUNA to Fort Stewart Federal Credit Union and interim overpayments paid by Mrs. Kirton and Mr. Carroll, during the years between Mr. Kirton's death in 1994 and the CUNA payment in 1999.

of itself not unlawful in this sense, and a recovery is sought only on account of damage subsequently accruing from and consequent upon the act, the cause of action accrues and the statue begins to run only when the damage is sustained; but if the act causing such subsequent damage is of itself unlawful in the sense that it constitutes a legal injury to the plaintiff, and is thus a completed wrong, the cause of action accrues and the statute begins to run from the time the act is committed, however slight the actual damage then may be." Hoffman v. Insurance Company of North America, 241 Ga. 328, 329, 245 S.E.2d 287, 289 (Ga. 1978). A cause of action in negligence accrues and the statute of limitation begins to run when there is a negligent act coupled with a proximately resulting injury. U-Haul Co. v. Abreu & Robeson, 247 Ga. 565, 566, 277 S.E.2d 497 (Ga. 1981) . *See* Lankford v. Trust Company Bank, 141 Ga. App. 639, 234 S.E.2d 179 (Ct. App. Ga. 1977)(In an action for injuries based upon the alleged negligence of a defendant, the statute of limitation commences to run from the breach of the duty, and not from the time when the extent of the resulting injury is ascertained.); Travis Pruitt & Associates, P.C. v. Bowling, 238 Ga. App. 225, 226, 518 S.E.2d 453, 454 (Ct. App. Ga. 1999)(The true test to determine when a cause of action accrues is to ascertain the time when the plaintiff could first have maintained her action to a successful result.).

A cause of action for negligent misrepresentation will arise when three essential elements are met. First, the defendant must negligently supply false information to foreseeable persons, known or unknown. Second, the persons receiving

such information must reasonably rely upon it. Finally, an economic injury must proximately result from such reliance. Hardaway Co. v. Parsons, Brinckerhoff, Quade & Douglas, Inc., 267 Ga. 424, 426, 479 S.E.2d 727 (Ga. 1997). Assuming that the pleadings set forth by the Debtors in this Adversary Proceeding are true, and that Don Winkles as Vice-President of the Fort Stewart Federal Credit Union owed the Kirtons a duty to pursue a claim on Mr. Kirton's life insurance policy, he breached this duty by his failing to pursue the claim and by informing Mrs. Kirton that there was no claim to collect due to Mr. Kirton's age at the time of his death. Mrs. Kirton, in her deposition, stated that she was told there was no insurance for her to collect (Kirton, Depo. p. 24), and due to her reliance, she did not attempt collection until July and August of 1999. Mrs. Kirton suffered an economic injury from this reliance, specifically the additional payments made to the Credit Union beginning with the first payment due after Mr. Kirton's death. The triggering act in this case is therefore the death of James Kirton, coupled with the failure to collect the policy, which occurred in November of 1994. This adversary proceeding was filed on November 15, 2000, more than four years after Mrs. Kirton suffered actual economic injury. This suit is therefore time barred.[4]

[4] 11 U.S.C. §108, which provides a trustee with an additional two years after the filing of a petition to bring an action that had not expired at the time of filing, also fails to provide the Debtors with additional relief, because Debtors' current Chapter 13 was filed in July 1999 which is also more than four years after the cause of action occurred.

The Movant also argues that the Debtors are judicially estopped from bringing this Adversary Proceeding because they failed to list the claim against Fort Stewart Federal Credit Union in their 1997 Bankruptcy case and in their 1999 case. Judicial estoppel precludes a party from asserting a position in one judicial proceeding that is inconsistent with a position successfully asserted in a prior proceeding. Scoggins v. Arrow Trucking Company, 92 F.Supp.2d 1372, 1375 (S.D. Ga. 2000)(quoting Reagan v. Lynch, 241 Ga. App. 642, 524 S.E.2d 510 (Ct. App. Ga. 1999)).

An estoppel may arise when "a party remains silent under circumstances where there exists a duty to make factual disclosures." In re Louden, 106 B.R. 109, 112 (Bankr. E.D.Ky. 1989). If the debtor "turns around to pursue claims he or she had previously misrepresented or failed to reveal, the debtor commits a fraud upon the courts and will be estopped." Brassfield v. Jack McLendon Furniture, Inc., 953 F. Supp. 1424, 1432 (M.D. Ala. 1996).

This Court must examine three factors in determining whether judicial estoppel applies in the present case, namely, whether the claim arose before the filing of the bankruptcy petition, why the claim was omitted from the petition, and whether or not there was an amendment to the petition to include the claim. Booker T. Brown

v. Savannah Rehabilitation & Nursing Center, No. 497-75, slip op. at 2-3 (S.D. Ga. filed July 16, 1997). As previously established in this order, the claim arose in November of 1994, shortly after Mr. Kirton's death, long before the 1997 and 1999 bankruptcies. The Debtors never amended their schedules to list a claim against Fort Stewart Federal Credit Union, even after the filing of this adversary proceeding. The deposition of William Carroll states that he contacted a representative of CUNA on August 13, 1999, after contacting a representative of the Fort Stewart Federal Credit Union a few weeks earlier. (Carroll, Dep. p. 12-13). Both of these events occurred after the filing of the July 1999 Chapter 13 petition and after the meeting of creditors in that case. Mrs. Kirton and Mr. Carroll were represented by counsel at that time, and have offered no justification as to why they have not amended their schedules or why the claim was omitted from the schedules. As such, they are judicially estopped from asserting the claim in this proceeding. *See* Scoggins v. Arrow Trucking Company, 92 F.Supp.2d 1372 (S.D.Ga. 2001)(holding that a debtor was judicially estopped from pursing a claim due to his failure to disclose it in his bankruptcy proceeding).

O R D E R

Due to the findings on the preceding issues, this Court does not need to reach the Movant's contentions with respect to Standing, Failure to Join an Indispensable Party, and Failure to State a Claim. IT IS THEREFORE THE

ORDER OF THIS COURT that the Movant's Motion for Summary Judgment is GRANTED.

Lamar W. Davis, Jr.
United States Bankruptcy Judge

Dated at Savannah, Georgia

This ____ day of June, 2001.